SHAHARUDDIN ALI & ANOR

v.

SUPERINTENDENT OF LANDS AND SURVEYS KUCHING DIVISION & ANOR

HIGH COURT SABAH & SARAWAK, KUCHING
CLEMENT SKINNER J
[SUIT NO: 22-142-2002-I]
25 AUGUST 2004

CIVIL PROCEDURE: *Striking out - Abuse of process - Action against public authority for native customary rights over land and compensation - Whether action should have been brought by way of judicial review and not ordinary action - Rules of the High Court 1980, O. 53*

NATIVE LAW AND CUSTOM: *Land dispute - Customary rights over land and compensation - Action against public authority - Whether action should have been brought by way of judicial review and not ordinary action - Rules of the High Court 1980, O. 53*

NATIVE LAW AND CUSTOM: *Land dispute - Customary rights over land and compensation - Plaintiffs dissatisfied with decision of public authority - Whether s. 5(4) Land Code (Sarawak) compelled plaintiffs to refer dissatisfaction to arbitration pursuant to s. 212 of same*

PUBLIC AUTHORITIES: *Remedies - Action for native customary rights over land and compensation - Whether action should have been brought by way of judicial review and not ordinary action - Rules of the High Court 1980, O. 53*

The plaintiffs' alleged native customary rights ('alleged rights') over certain parcels of land ('the said lands') were extinguished by virtue of a notification in the government gazette by way of a direction ('the direction') under s. 5(3) and (4) of the Sarawak Land Code ('the Land Code'). In accordance with the provisions of s. 5(3) of the Land Code, the plaintiffs submitted their claims for compensation to the 1st defendant. Their claims were rejected and they were told to refer the matter for arbitration under s. 212 of the Land Code. The plaintiffs commenced this action instead for several declarations, *inter alia*, that they had rights over the said lands and that the direction and reference to arbitration was null

and void. The defendants applied for stay of proceedings pursuant to s. 6 of the Arbitration Act 1952. Alternatively, to have the plaintiffs' action struck out. The Deputy Registrar dismissed the defendants' application. Hence, the defendants' appeal.

The issues were: (1) whether the defendants made out a case for stay of proceedings; (2) whether the plaintiffs' action was an abuse of process and an attempt to circumvent the provisions of O. 53 of the Rules of the High Court 1980 ('the RHC'); (3) whether the plaintiffs sought remedies for infringements of rights protected by public law; and (4) whether if the plaintiffs' application by way of O. 53 RHC was applicable, the exception to the general rule in *O'Reilly v. Mackman* applied on the facts.

Held (allowing the appeal):

[1] On the facts of this case, the defendants had not made out a case for stay of proceedings. This was because under s. 5(4) of the Land Code, the plaintiffs could not be compelled to refer to arbitration any dissatisfaction they might have had with the decision of the 1st defendant, the operative word in the sub-section being "may". (p 781 d)

[2] The Minister who issued the direction and the 1st defendant who rejected the plaintiffs' claim for compensation acted under the powers conferred upon them by s. 5(3) of the Land Code. They are public authorities whose decisions are subject to the supervisory control of the court by way of judicial review under O. 53 RHC. (p 786 g-h)

[3] Although the plaintiffs claimed that their alleged rights (which they claimed to have acquired through persons who had created those rights before 1958) were proprietary in nature, the fact remained that those rights were created or recognized by statute (see Land Code s. 5(1), (2); Land Settlement Ordinance 1933, s. 66). Therefore, their alleged rights were rights protected by public law and did not arise out of any private contract or arrangement between the plaintiffs and the government. Accordingly, the plaintiffs' remedy to enforce or protect rights created or acquired or recognized in accordance with the provisions of the Land Code must be sought under public law and not private law. That being the case, the plaintiffs should have proceeded by way of O. 53 RHC unless the exception to the general rule in *O' Reilly v. Mackman* was applicable – which on the facts was inapplicable. (pp 786 h, 787 a-h & 788 a, g)

[4] The plaintiffs' prayer for a declaration that "the plaintiffs had acquired native customary rights" was only incidental to the principal relief sought, *ie*, the nullification of the direction by the Minister. This was because if the direction was nullified, only then would the plaintiffs' alleged rights not be infringed by being extinguished. It followed that the challenge to the legality or validity of the direction was not a collateral issue as alleged by the plaintiffs. It was the central issue of their action. Further, the prayer sought by the plaintiffs that the direction was "null and void and of no legal effect" was clearly a *certiorari* to have the direction quashed. However, the plaintiff had attempted to circumvent the protections afforded to public authorities by O. 53 RHC, particularly, the requirement to obtain leave. Nevertheless, it was unlikely that leave would be granted as the statutory period to apply for leave was not satisfied. The plaintiffs, too, did not apply to extend the statutory period. In addition, the plaintiffs originally proceeded as if they had accepted the validity or legality of the direction by the Minister by submitting their claims for compensation pursuant to the direction. It was only when their claim for compensation was rejected that they questioned the legality of the direction. The plaintiffs would be obliged to disclose such fact on an application for leave to bring judicial review. Such disclosure would certainly be a ground for the court to refuse leave on the basis that the plaintiffs reprobated what they had approbated. (pp 789 f-g, 790 a, 791 d-h & 792 a)

Case(s) referred to:

Abdul Razak Ahmad v. Majlis Bandaraya Johor Bahru [1995] 4 CLJ 339 HC ***(refd)***

Baltim Timber Sdn Bhd v. The Minister of Resources Planning & Ors [1993] 2 CLJ 327 HC ***(refd)***

O'Reilly v. Mackman [1983] 2 AC 237 ***(refd)***

Sivarasa Rasiah v. Badan Peguam Malaysia & Anor [2002] 2 CLJ 697 CA ***(foll)***

Subramaniam Vythilingam v. The Human Rights Commissioner of Malaysia (Suhakam) & Ors [2003] 6 CLJ 175 HC ***(refd)***

Yahya Kassim v. Government of Malaysia & Anor [1998] 1 CLJ 43 CA ***(refd)***

Legislation referred to:

Arbitration Act 1952, s. 6
Federal Constitution, art. 161A
Land Code (Sarawak), ss. 5(1), (2), (3), (4), 212
Rules of the High Court 1980, O. 53 r. 3(6)
Specific Relief Act 1950, s. 41

For the plaintiffs - Baru Bian (See Chee How); M/s Baru Bian & Advoc
For the defendants - JC Fong (Jonathan Jolly & Kezia Norella Daim)

Reported by Usha Thiagarajah

JUDGMENT

Clement Skinner J:

This is the hearing of an appeal to the judge in chambers from the decision of the learned deputy registrar who, on 22 April 2003, dismissed the defendants' application to either stay the present proceedings pursuant to s. 6 of the Arbitration Act 1952 (hereafter 'the Act'), so that the dispute between the plaintiffs and the defendants may be referred to arbitration under s. 5(4)(a)(i) read with s. 212 of the Sarawak Land Code (hereafter the 'Land Code'), or, alternatively to have the writ of summons and statement of claim herein struck out or, in the further alternative, for para. 10(i), (ii), (iii) and (iv) of the statement of claim to be struck out.

The defendants being dissatisfied with the decision of the deputy registrar, bring this appeal.

The facts leading up to the defendants' application may be briefly stated.

The plaintiffs' claim that at all material times they had acquired native customary rights over certain parcels of land indicated on a map attached to their statement of claim (hereafter 'the said lands'). The said lands are situated in an area between Loba Rambungan and Jalan Kubah National Park, Kuching, Sarawak (hereafter 'the said area').

The plaintiffs claim to have acquired their native customary rights to the said lands through sale transactions entered into between them and persons who allegedly 'owned' those native customary rights or whose relatives had purportedly acquired such rights by cultivating the said lands before the year 1958.

It is pleaded by the plaintiffs (in para 7 of the statement of claim) that by virtue of a notification appearing in the Government Gazette dated 14 November 2001 being the Land (Native Customary Rights) (No. 143) 2001 Direction ('the Direction') issued under s. 5(3) and (4) of the Land Code, all native customary rights over certain areas of land situated between Loba Rambungan and Kubah National Park containing approximately 23.06

hectares, were extinguished. It should be noted that the Direction referred to above is issued by the Minister of Planning and Resource Management ('the Minister') pursuant to s. 5(3) of the Land Code.

The said lands were affected by the Direction, as a result of which the native customary rights which the plaintiffs claimed over the same were extinguished and the said lands reverted back to the Government. However, notwithstanding the fact that any lands affected by the Direction may revert back to the Government under s. 5(3) of the Land Code, the Government is obliged to pay compensation to any person who can establish his claim to native customary rights over land affected by the Direction and the sub-section sets out the procedure for making such claims to the Superintendent, while sub-section (4) of s. 5 sets out the procedure where a claimant is dissatisfied with any decision of the Superintendent. Essentially, any person who is dissatisfied with any decision of the Superintendent "may within 21 days from the receipt of the decision of the Superintendent, require the matter to be referred to arbitration in accordance with s. 212 of the Land Code".

Following the extinguishment of their alleged native customary rights by the Direction, the plaintiffs, in accordance with the provisions of s. 5(3) of the Land Code, submitted their claims for compensation to the Superintendent. By two letters dated 21 October 2002 the Superintendent (1st defendant here) notified the plaintiffs that all their claims for compensation had been rejected, and that the plaintiffs were entitled to refer the matter for arbitration under s. 212 of the Land Code if they were dissatisfied with his decision.

On 28 October 2002 the plaintiffs informed the Superintendent (1st defendant) that they would challenge the Direction as well as his decision in court. On 2 November 2002 the plaintiffs commenced this action.

From their pleadings, the heart of the plaintiffs' case is found in para. 10.1 which reads:

> 10.1 The plaintiffs state that the extinguishment of their NCR over the said lands was null and void and of no legal effect for the following reasons:
>
> (i) That the Defendants had no power to extinguish the said NCR under section 5(3) and (4) of the Land Code (Cap. 81) as the said provisions had been amended by virtue of the Land Code (Amendment) 2000.

(ii) The Plaintiffs claim that they were not given the opportunity to prove their claims on NCR before their claims were rejected by the 1st Defendant.

(iii) Even if the said section 5(3) and (4) is valid (which is denied) the same is unconstitutional *vis-a-vis* Article 161A of the Federal Constitution.

(iv) That the said lands had been one of the sources of the Plaintiffs' livelihood and therefore it is unconstitutional and/or wrongful for the 1st and 2nd Defendants in extinguishing the said NCR over the said lands without giving the Plaintiffs adequate compensation as provided for under Article 13 of the Federal Constitution.

The relief which the plaintiffs sought by this action were:

(i) A Declaration that the plaintiffs had acquired customary rights (NCR) over the said lands respectively;

(ii) A Declaration that the said Notification (Direction) purportedly done under s. 5(3) and (4) of the Land Code (Cap. 81) Sarawak, was null and void and of no legal effect;

(iii) A Declaration that the said Notification was null and void and of no legal effect *vis-a-vis* art. 161A of the Federal Constitution;

(iv) A Declaration that the reference by the 1st defendant to arbitration under s. 212 of the Land Code (Cap. 81) Sarawak of all the plaintiffs' claim was null and void and of no legal effect.

(v) General and exemplary damages if any.

On being served, the defendants entered a conditional appearance, whereafter they made the application which I earlier referred to. It was heard by the learned deputy registrar. He dismissed it because he took the view that the defendants' application for stay could not be granted for three reasons:

(a) while s. 6 of the Arbitration Act 1952 allows the court to grant a stay of legal proceedings where the parties to the proceedings are a 'party to an arbitration agreement' in which they have agreed to refer any dispute between them to arbitration, the deputy registrar held that s. 2 of the Arbitration Act defined an 'arbitration agreement' as meaning a written agreement to submit differences to arbitration. Since there

was no written agreement between the plaintiffs and defendants to refer their differences to arbitration but only 'an agreement by conduct of purported submission to the arbitration procedures by the plaintiff', the deputy registrar held that s. 6 of the Arbitration Act had no application to the facts of this case; and

(b) the plaintiffs could not be compelled to refer their dissatisfaction to arbitration pursuant to s. 212 of the Land Code, because s. 5(4) uses the word 'may'. So the deputy registrar held that the plaintiffs were not prohibited from seeking other reliefs through the civil courts;

(c) the reliefs claimed by the plaintiffs, such as the declaration sought regarding the constitutionality or validity of the various provisions of the Land Code which were under attack by the plaintiffs, were matters which were not suitable for adjudication by the arbitrator.

On the hearing of the appeal I did not think that on the facts of this case, the defendants had made out a case for stay of proceedings because under s. 5(4) of the Land Code, the plaintiffs could not be compelled to refer to arbitration any dissatisfaction they may have with the decision of the Superintendent, the operative word in the sub-section being 'may'.

However, that did not bring the matter before me to an end because the defendants had also applied to strike out the plaintiffs' action on the ground that it was an abuse of the process of the court. Having considered the pleadings in the case and in particular the matters pleaded in para. 10 thereof as well as the reliefs sought and the matters disclosed in the affidavits before the court, it appeared to me that what the plaintiffs were really trying to do by instituting this suit was to impugn the Direction issued by the Minister extinguishing their native customary rights over the said lands and impugn the decision of the Superintendent as well in rejecting their claims for compensation in respect of the extinguishment of their alleged rights, on grounds of alleged error of law, breach of the rules of natural justice, illegality, unconstitutionality and violations of their fundamental liberties. If that was the case then the plaintiffs were in effect seeking to review and to have the decision of the Minister and Superintendent quashed, a matter which is governed by O. 53 Rules of the High Court 1980 ('the RHC'). Accordingly I invited the parties to address me on whether, after the amendment to O. 53 RHC which came into effect

on 22 September, 2000, the plaintiffs' present suit was an attempt to side-step the provisions of O. 53 RHC, thereby abusing the process of the court and liable to be struck out.

In their submissions to me on the point, the defendants took the following position:

(1) After September, 2000 when the amended provisions of O. 53 came into force, an applicant in judicial review cases is permitted to incorporate or include a prayer for declaration, either jointly or in the alternative in the same application if it relates to or is connected with the same subject matter as in the judicial review application, which was not the case before the amendment to O. 53 RHC.

(2) The plaintiffs in the present suit have commenced a civil action whereby they principally claim, *inter alia*, that:

(a) the Minister's Direction made under s. 5(3) and (4) of the Land Code is void; and

(b) the Superintendent's (1st defendant's) decision in rejecting their claims of native customary rights over the said land is also null and void purportedly for breach of the rules of natural justice.

(3) Therefore, fundamental to the success of the plaintiffs' claim for native customary rights over the said lands and to compensation for the extinguishment thereof, is the validity or constitutionality of the Minister's Directive. This is an issue of public law.

Similarly, the plaintiffs' allegation that the 1st defendant's rejection of their claims for compensation for extinguishment of their native customary rights over the said land was bad on grounds of breach of the rules of natural justice is also a public law issue.

(4) The Direction issued under s. 5(3) of the Land Code was made by the Minister, and the decision to reject the claims for compensation submitted by the plaintiffs pursuant to the Direction was made by the 1st defendant. Both the Minister and the 1st defendant acted under powers conferred upon them by s. 5(3) of the Land Code, and are public authorities whose decisions are subject to the supervisory control of the court through the process of judicial review.

(5) Being aggrieved by the said Direction and being dissatisfied with the 1st defendant's decision not to entertain their claims for compensation for extinguishment of their native customary rights over the said lands, the plaintiffs should have proceeded by way of judicial review under O. 53 RHC to quash the Minister's Direction and the 1st defendant's decision.

(6) The plaintiffs did not commence an application for judicial review in accordance with the provisions of O. 53 RHC and tried to circumvent the necessity to seek leave of the court as required by O. 53 as they knew the Direction was issued and gazetted well before this suit was filed and their application for leave for *certiorari* would be well outside the 40 days stated in the rule to apply for such leave. They have, therefore, abused the process of court. In support of their contention the defendants rely on *O'Reilly v. Mackman* [1983] 2 AC 237 which has been referred to with approval by our courts. See *Yahya bin Kassim v. Government of Malaysia & Anor* [1998] 1 CLJ 43. In *O'Reilly v. Mackman* the following general rule was stated by Lord Diplock at p. 285:

> Now that those disadvantages to applicants have been removed and all remedies for infringements of rights protected by public law can be obtained upon an application for judicial review, as can also remedies for infringements of rights under private law if such infringements should also be involved, it would in my view as a general rule contrary to public policy and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by this means to evade the provisions of Order 53 for the protection of such authorities.

On their part, the plaintiffs took the following position and stand:

(1) The plaintiffs are entitled to bring this action by writ for the declaration of their native customary rights and to challenge the provisions in the Land Code and the Minister's Direction made thereunder.

(2) In this suit the plaintiffs' principal prayer and 1st relief prayed for is a declaration that the plaintiffs had acquired native customary rights over the said lands and so their remedies lie in s. 41 of the Specific Relief Act 1950 and not O. 53 RHC. Section 41 Specific Relief Act reads:

> Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to the character or right; and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in that suit ask for any further relief:
>
> Provided that no court shall make any such declaration where the plaintiff; being able to seek further relief from a mere declaration or title, omits to do so.

(3) The very essence and fundamental to the plaintiffs' present suit is the establishment and proof that the plaintiffs had acquired native customary rights over the said lands. Land rights are proprietary rights and they are private rights. The plaintiffs' claim to have acquired native customary rights over the said lands and to be paid compensation for the extinguishment of such rights are not dependent on the validity or constitutionality of the Minister's Direction.

(4) Consequently, the validity or constitutionality of the Minister's Direction are collateral issues for determination of the court.

(5) In an action such as the present, wherein the plaintiffs' primary prayer is for declaratory order as to their proprietary rights and a frontal challenge on the constitutionality of specific provisions of the Land Code together with a challenge to the Minister's Direction on the ground of unconstitutionality and illegality and not on the decision making process, the remedies sought for do not fall squarely within the ambit of judicial review. So an application under O. 53 is not appropriate in the circumstances.

(6) The principle stated in *O'Reilly v. Mackman* is not applicable in this case, but if it is the plaintiffs' claims come under the exceptions to the general rule because (a) no party objects to the adoption of a writ action by the plaintiffs, and (b) the plaintiffs' challenge to the specific provisions of the Land Code and validity of the Minister's Direction are collateral issues in this action.

(7) The well intentioned reform to our O. 53 RHC should not be interpreted to create procedural exclusivity in administrative law, used to deny a subject a right of action in the court of his choice.

From the submissions that have been addressed to me, the plaintiffs and the defendants share a common ground regarding the purpose and scope of O. 53 since its amendment in September 2000. Both parties agree that where it is sought to control or review the decision of or the exercise of power by a person or body entrusted with the 'enforcement of public duties', then O. 53 is the appropriate route to seek relief, and, that it is now permissible for the party doing so to include a prayer for a declaration, either jointly or in the alternative in the same application if it relates to or is connected with the same subject matter. I should add that the court hearing an application under O. 53 may now also grant an injunction and damages by way of relief – something it could not do in the past. In this regard both parties referred me to the decision of the Court of Appeal in *Sivarasa Rasiah v. Badan Peguam Malaysia & Anor* [2002] 2 CLJ 697 where his Lordship Gopal Sri Ram JCA at pp. 705, 706 said:

> Order 53 in its present form was introduced to cure the mischief of its precursor which was much narrower and more restrictive.

The parties also share common ground when they recognise that O. 53 RHC contains provisions designed to protect those entrusted with the enforcement of public duties against irresponsible and protracted litigation. In their submissions, the plaintiffs have correctly identified this protection as being afforded by:

(a) the need to obtain leave to apply;

(b) the need to file affidavits from the outset, so that the case has to be stated on oath and with the utmost good faith, 'an important safeguard against groundless or unmeritorious claims' in contrast with the unsworn pleadings in an ordinary action;

(c) the court's power on granting leave to impose terms as to costs or security;

(d) very speedy procedure, 'available in urgent cases within a matter of days rather than months'; and

(e) the time limit, now reduced to 40 days and extended to all forms of relief;

What is said above is of course culled from the speech of Lord Diplock in *O'Reilly*'s case.

Where the parties differ regarding the application or appeal before me is on the question whether the plaintiffs are by this suit seeking relief or remedy for the infringement of rights protected by public law or private law, because if it is the former then it would appear that O. 53 RHC is the proper route to seek that relief, especially now that O. 53 has been amended to allow for all the remedies and reliefs which the plaintiffs seek in this suit to be obtained through judicial review proceedings. The defendants take the stand that the plaintiffs are seeking to enforce rights recognised and protected by public law but have attempted to side step the protection afforded to public bodies by O. 53 by proceeding to file an ordinary action. In doing so the defendants say the plaintiffs have abused the process of the court. The plaintiffs, of course, take just the opposite stand. They say they are enforcing their rights under private law which they are entitled to do through an ordinary action for a declaration and damages.

A further area of dispute between the parties is whether, if it is held that the plaintiffs are enforcing their rights under public law and should therefore seek their remedy under O. 53 RHC, their claims fall within the exceptions to the general principal stated in *O'Reilly*'s case.

It is to the matters in dispute between the parties that I must now turn my attention.

Are the plaintiffs seeking remedies for infringements of rights protected by public law?

The plaintiffs say that the very essence and fundamental to their present suit is the establishment and proof that they had acquired native customary rights over the said lands and that land rights are proprietary rights, which are private rights. Consequently, they argue that the validity or constitutionality of the Minister's Direction are only collateral issues for determination of the court.

I regret I do not agree with the above submissions and say so for the following reasons: In the first place, both the Minister (who issued the Direction) and the 1st defendant (who rejected the plaintiffs' claims to compensation) acted under powers conferred upon them by s. 5(3) of the Land Code, and are public authorities whose decisions are subject to supervisory control of the court through process of judicial review under O. 53 RHC. In the second place, although the plaintiffs say that the native

customary rights which they claim to have over the said lands are pre-existing rights and proprietary rights which are private rights, it was pointed out by counsel for the defendants, and in my view correctly, that native customary rights by reason of s. 5(1) of the Land Code can only be created or acquired 'as from 1 January 1958' by any of the methods specified in sub-section (2), upon Interior Area Land and s. 5(2) spells out 'the methods by which native customary rights may be acquired', while Proviso (ii) to sub-section (2) reads:

> the question whether any such right has been acquired or has been lost or extinguished, save in so far as this Code makes provision to the contrary, be determined by the law in force immediately prior to 1st January, 1958.

The law that was in force immediately prior to 1 January 1958 is found in s. 66 of the Land Settlement Ordinance 1933 (also known as the Rajah's Order L.7 of 1933) which reads:

> Native customary rights shall be held to be:
>
> (a) Land planted with fruit trees, when the number of fruit trees amounts to twenty and upwards to each acre.
>
> (b) Land that is in continuous occupation or has been cultivated or built on within three years.
>
> (c) Burial grounds or shrines.
>
> (d) Usual rights of way for men and animals from rivers, roads or houses to any or all of the above.

So although the plaintiffs say that the native customary rights which they claim to have acquired (through persons who had created those rights before 1958) are proprietary in nature, the fact remains that the rights which they claim are rights created or recognised by statute, or put in another way, they are rights protected by public law. The plaintiffs' alleged native customary rights do not arise out of any private contract or arrangement between the plaintiffs and the Government (the defendants here), or put in another way, there is no infringement of a right of the plaintiffs arising under private law.

It is for the above reasons that I agree with the contention of counsel for the defendants that the plaintiffs' remedy to enforce or protect rights created or acquired or recognised in accordance with the provisions of the Land Code must be sought under public law and not private law. That

being the case, the plaintiffs here should have proceeded to seek judicial review of the Minister's Direction and 1st defendant's decision under O. 53 RHC, unless of course they can bring themselves within the exceptions to the general rule stated in *O'Reilly v. Mackman (supra)* which is the next question I will address.

Do the plaintiffs' claims fall within the exception to the rule in *O'Reilly*'s case?

Lord Diplock recognised that there were certain exceptions to the general rule referred to by him in that case. This is what he said at p. 285:

> My Lords, I have described this as a general rule; for though it may normally be appropriate to apply it by the summary process of striking out the action, there may be exceptions, particularly where the invalidity of the decision arises as a collateral issue in a claim for infringement of a right of the plaintiff arising under private law, or where none of the parties objects to the adoption of the procedure by writ or originating summons.

The plaintiffs say they come within the exceptions stated in *O'Reilly*'s case because (a) none of the parties object to the plaintiffs' commencement of this action by ordinary writ action; (b) the invalidity of the Minister's Direction arises as a collateral issue to their claim for infringement of a right of the plaintiff arising under private law.

I have already addressed the issue whether the plaintiffs' rights arise under private law. I will now consider the remaining exceptions in the context of the plaintiffs' claim. The plaintiffs say none of the parties objected to their writ action. I do not think this accurately describes what has happened here. The defendants' application did include a prayer, in the alternative, that the plaintiffs' writ of summons and statement of claim be struck out on the grounds, *inter alia*, that the plaintiffs' action is an abuse of the process of court. Although the defendants did not initially address the court on the issue of abuse of process and it was the court that invited the parties to do so, I did not think it wrong to do so as the court is always vigilant to see that its process is not abused and the facts before the court called for a closer scrutiny of the route taken by the plaintiffs. Accordingly, I do not think this exception avails itself to the plaintiffs.

On the question whether that the invalidity of the Minister's Direction arises only as a collateral issue, it is the plaintiffs' case that fundamental to their claim to have acquired native customary rights over the said lands and to be paid compensation for the extinguishment of those rights, is the proof that the plaintiffs had acquired native customary rights over the land and not the validity or constitutionality of the Minister's Direction.

I regret that I can only agree to a limited extent with what is contended by the plaintiffs. While I agree that to obtain their first prayer for a declaration that they had acquired native customary rights over the said lands it would be incumbent on the plaintiffs to establish or prove that they have acquired native customary rights over the said lands as otherwise they would not be able to show that they have been affected by the decision of the public authority, the matter does not end there because even if the plaintiffs succeed in establishing their native customary rights as alleged, unless they succeed in getting the decision of Minister to make the Direction quashed, that Direction has the overwhelming effect of terminating or extinguishing the plaintiffs' native customary rights over the said lands. So it is apparent to me that what is really being attacked by the plaintiffs by their pleadings is clearly the Minister's Direction. Counsel for the defendants submitted, and I agree with him, that it is crucial to the plaintiffs' case that they somehow nullify or set aside or 'kill off' the Direction, because merely obtaining a declaration that they have native customary rights would not have met their objective to prevent the infringement of their alleged rights. I therefore agree with counsel for the defendants that the first prayer for a declaration that 'the plaintiffs had acquired native customary rights' is only incidental to the principal relief sought which is the nullification of the Direction, because if it is nullified through the court or the same is held to be invalid for reasons that it is made without power or is unconstitutional, only then would the plaintiffs' alleged rights not be infringed (by extinguishment).

So the challenge to the legality or validity of the Minister's Direction cannot be a collateral issue as alleged. It is the central issue – the Minister's Direction is not concerned with the alleged acquisition of the rights claimed by the appellants, but has everything to do with their extinguishment. The Direction must be a central not collateral issue.

It is also my view that the first prayer sought by the plaintiffs herein, that the said Direction was 'null and void and of no legal effect', although couched or cast and sought as a declaration, is clearly in the nature of a *certiorari* to have the Direction quashed for the same grounds and reasons stated in the suit, but the plaintiffs have attempted to circumvent the protections afforded to public authorities by O. 53 RHC, particularly the requirement to obtain leave.

In arriving at the above conclusions I have not overlooked a submission of the plaintiffs that the court should not by the mere characterisation of the plaintiffs' claim as one founded in public law, exclude them from having their claims considered by an ordinary action. According to counsel for the plaintiffs, to do so would create procedural exclusivity or dual system of law leading to rigidity and procedural hardship for plaintiffs in the choice of forms of action, which would defeat the flexibility which the new O. 53 RHC was supposed to afford when seeking relief. According to counsel this was especially so as there is no saving provision found in our O. 53 which is equivalent to the English Order 53 r. 9(5) which allows the court to convert an application for judicial review into a writ action in the event the wrong form of action was selected. I have tried in the course of this judgment to show that for the reasons given, this is not a case where the plaintiffs' claims have been simply characterised as one arising in public law. Further, since the amendment to O. 53 RHC, all the reliefs and remedies which the plaintiffs seek in this action were at its commencement available to them under O. 53 and the court has not put any obstacles in their way to avail themselves of the flexibility afforded by the new O. 53, but if they have not availed themselves of it the court should not be blamed for any hardship they now face as a result of the route they have chosen. With regard to the submission that the Court should not interpret the new O. 53 in such a way as to create rigidity and procedural exclusivity leading to a dual system of law, I should point out that the Courts in Malaysia have for a long time now recognised the distinction between public law rights or remedies and private law rights or remedies. See *Baltim Timber Sdn Bhd v. The Minister of Resource Planning & 2 Ors* [1993] 2 CLJ 327; see *Subramaniamm a/l Vythilingam v. The Human Rights Commissioner of Malaysia (Suhakam) & 5 Ors* [2003] 6 CLJ 175; see *Yahya bin Kassim v. Government of Malaysia* [1997] 3 MLJ 749; see *Abdul Razak Ahmad v. Majlis Bandaraya Johor Bahru* [1995] 4 CLJ 339.

With regard to the warning of the plaintiffs about our amended O. 53 not containing a saving provision in it, I do not think that if it is demonstrated that the plaintiffs have indeed abused the process of court their action should be immunised from being struck out just because the court could not have converted their application for judicial review, if they had made one, into a writ action. I should also point out that where there is uncertainty, whether a case should have been brought by judicial review or ordinary action, the Court of Appeal has offered some guidance on the matter in *Sivarasa Rasiah v. Badan Peguam Malaysia & Anor* [2002] 2 CLJ 697. It was there said:

> If a case is brought by ordinary action and there is an application to strike out the case, the Court should, at least if it is unclear whether the case should have been brought by judicial review, ask itself whether, if the case have been brought by judicial review when the action was commenced, it is clear leave would have been granted. If it would, then that is at least an indication that there is no harm to the interests judicial review is designed to protect ...

Proceeding in the manner suggested in *Sivarasa*'s case, would leave have been granted under O. 53 RHC if this action had been brought for judicial review when it was commenced ie, on 2 November 2002? I do not think it would have. I say so for the following reasons.

The Minister's Direction extinguishing the alleged native customary rights of the plaintiffs was dated 14 November 2001 (see para 7 of the statement of claim). The plaintiffs knew about this Direction because on 4 March 2002 they submitted their claims for compensation. Under O. 53 r. 3(6) RHC an application for leave to apply for judicial review must be made within 40 days when the grounds for the application first arose or when the decision is first communicated to the applicant. The plaintiffs certainly knew of the Direction prior to 4 March 2002 when they submitted their claim for compensation to the 1st defendant. When this action was commenced on 14 November 2001 more than eight months had passed since the Direction was made. No application had been made by the plaintiffs to extend the statutory period to apply for leave. So it is unlikely leave would have been granted. In addition to what is said above, it should be noted that the plaintiffs had originally proceeded as if they accepted the validity or legality of the Minister's Direction by submitting their claims for compensation pursuant to the Direction. It was only when their claim for compensation was rejected that they questioned the legality of the Direction. Now, the plaintiffs would be obliged to disclose such fact

on an application for leave to bring judicial review. Such disclosure would certainly be a ground for the court to refuse the exercise of its discretion to grant leave on the ground of the *bona fides* of the plaintiffs in reprobating what they had approbated.

There is a final point which I need to address. In his submissions counsel for the defendants drew attention to the fact that while the plaintiffs are seeking in this action to impugn the Minister's Direction, he has not been made a party to the action. I do not think it is necessary to make him one. I agree with counsel for the plaintiffs that the Government of Sarawak is a party to this action and the Minister's Direction was merely the performance by him of an administrative function pursuant to the executive decision of the Government, who is already a party to this suit.

In the result, for all the reasons given above, I hold that it was an abuse of process for the plaintiffs to resort to an action for declaration and thereby evade the clear requirements of O. 53 RHC. I allow the appeal with costs and strike out the plaintiffs' suit.